Supreme Court, U. S.
FILED
FEB 20 1928
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925.

## No. 202

CHARLES C. CHILDERS, State Auditor of the State of Oklahoma, *Appellant*,

*vs.*

JOHN BEAVER AND BENJAMIN QUAPAW, *Appellees.*

## BRIEF OF APPELLANT.

An inheritance tax being a tax upon the devolution of property, and the devolution of all property of citizens of a state taking place solely by virtue of the laws of the State, the latter may collect an inheritance tax upon the devolution of the estates of its Quapaw Indian citizens.

GEORGE F. SHORT,
Attorney General of Oklahoma,

J. BERRY KING and
LEON S. HIRSH,
Assistant Attorneys General of Oklahoma,
*For the Appellant.*

C. H. NICHOLAS, Inheritance Tax Attorney,
State Auditor's Office, of Counsel.

Printed at Harlow Brief Printing Co., 324½ N. Broadway, Oklahoma City, Okla.

## INDEX.


Page

Index to Authorities ..... ii

Brief ..... 1

Assignment of Errors ..... 2

Statement ..... 3

Argument—

I. The Inheritance Tax of the State of Oklahoma is a tax upon the transitus of the property, an excise tax levied upon the privilege of taking property under the state law of succession, and the same is not a tax upon the property itself ..... 9

II. Members of the Quapaw tribe of Indians, residing within the State of Oklahoma, are citizens of said State, and, as such, their rights to transfer and receive property after death has its inception in, and is regulated by, the laws of the State of Oklahoma governing decedents' estates ..... 14

III. That the property, transmitted by decedent under the laws of descent ,is exempt from taxation does not prevent the operation of the succession tax upon the devolution of the estate ..... 33

IV. Quapaw Indian estates are not such a type of Federal instrumentality as to exempt their devolution from taxation under whose laws the transfer takes place ..... 38

Conclusion ..... 52

Page

United States Constitution and Statutes:
Constitution—

Article I, Section 8 ..... 2
Article VI, paragraph 2 ..... 2, 43
Amendment X ..... 3, 32

Statutes—

Judicial Code, Sec. 238 ..... 1
1 Stat. at L. 191 ..... 23
1 Stat. at L. 481, Ch. 47 ..... 23
2 Stat. at L. 641, Ch. 21 ..... 24
28 Stat. at L. 876, 907, Ch. 188 ..... 2, 9, 14, 33
32 Stat. at L. 500, Ch. 1323, Sec. 6 ..... 4 6, 19
33 Stat. at L. 573, Ch. 1824 ..... 2, 3, 15, 16
34 Stat. at L. 267, Ch. 3335 ..... 2, 3, 15, 17, 22, 41
35 Stat. at L. 312, Sec. 9 ..... 18, 29
36 Stat. at L. 855 ..... 3, 4
41 Stat. at L. 1225, 1248 ..... 2, 33

Oklahoma Laws:
Constitution, Article XXV, Section 2 ..... 18
Statutes—

Rev. Stat. 1903, Ch. 86, Art. 4 ..... 18
Session Laws 1915, Ch. 162 ..... 10
Compiled Laws 1921, Sec. 9891 ..... 5
Compiled Laws 1921, Sec. 9896 ..... 5
Compiled Laws 1921, Sec. 9898 ..... 6, 33
Compiled Laws 1921, Sec. 9900 ..... 6, 36, 37
Annals of Congress, Vol. 1, p. 455 ..... 46
Beaver v. Short, 300 Fed. 113 ..... 1
2 Blackstone Comm., pp. 10-13 ..... 12
Bledsoe, Indian Land Laws (2nd ed.), Sec. 263 ..... 14
Bolln v. Nebraska, 176 U. S. 83 ..... 15
Booth's Executor v. Commonwealth, 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N.S.) 592 ..... 10, 11, 13, 32
Boyd v. Nebraska, 143 U. S. 175 ..... 15

**Page**

Carter v. Whitson, 85 Okla. 137, 212 Pac. 752 ---- 10, 32, 35
Choate v. Trapp, 224 U. S. 665 ---- 41
Clymer vs. Commonwealth, 52 Pa. 181 ---- 10
Cohens v. Virginia, 6 Wheat. (U. S.) 264 ---- 49
Coyle v. Oklahoma, 221 U. S. 559 ---- 22
Davis v. Davis, 109 U. S. 485 ---- 28
Fyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367 ---- 12
Federalist, Essay No. 31 ---- 48
Grafton v. United States, 206 U. S. 333 ---- 21
Graves v. Jacobs, 92 Okla. 62, 217 Pac. 871 ---- 20
Hammer v. Dagenhart, 247 U. S. 241 ---- 22
Harrison v. Harrison, 87 Okla. 91, 209 Pac. 737 ---- 20
Hawkins v. Blackley, 243 U. S. 210 ---- 26
Heckman v. United States, 224 U. S. 413 ---- 15
Jefferson v. Fink, 247 U. S. 288 (Aff. 53 Okla. 272, 115 Pac. 852) ---- 15, 19, 20
Kansas v. Colorado, 206 U. S. 95 ---- 26
Kendall v. Ewert, 259 U. S. 139 ---- 37
Kidd v. Pearson, 128 U. S. 1 ---- 27
Knowlton v. Moore, 178 U. S. 43 ---- 28
Langdon v. Sherwood, 124 U. S. 74 ---- 28
LaTourette v. McMaster, 248 U. S. 465 ---- 10
McCormick v. Sullivant, 10 Wheat. (U. S.) 192 ---- 28
McCulloch v. Maryland, 4 Wheat. (U. S.) 316 428 ---- 21, 39, 42
McNulty v. Beatty, 10 How. (U. S.) 71 ---- 25
Mager v. Grimes, 48 U. S. 490 ---- 27, 35
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283 ---- 13, 32
Minor v. Happersett, 21 Wall. (U. S.) 162 ---- 15
Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259 ---- 11
Munn v. Illinois, 94 U. S. 113 ---- 27
New York v. Miln, 11 Pet. (U. S.) 102 ---- 27
O'Callighan v. O'Brien, 199 U. S. 99 ---- 28

Page

Orr v. Allen, 248 U. S. 55 ---------- 10
Pennoyer v. Neff, 95 U. S. 714 ---------- 24
Pigeon's Estate, In re, 81 Okla. 180, 198 Pac. 309 ---------- 19, 21
Plummer v. Coler, 178 U. S. 115 ---------- 13, 28, 33
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 537 ---------- 34, 49
Segley v. Car Co., 120 U. S. 580 ---------- 28
Sherman, Estate of, 153 N. Y. 1, 46 N. E. 1052 -- 35
Shulthis v. McDougal, 225 U. S. 561 ---------- 17
Slaughterhouse Cases, 16 Wall. (U. S.) 536 ---- 22
Snyder v. Bettman, 190 U. S. 249 ---------- 28
South Carolina v. United States, 199 U. S. 437 ---------- 42, 49
State v. Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178 ---------- 11
State v. Hamlin, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569 ---------- 11
Strode v. Commonwealth, 52 Pa. 181 ---- 10, 12, 35
Sunderland v. United States, 266 U. S. 226 -- 29, 31
Teague v. Smith, 85 Okla. 12, 204 Pac. 439 ------ 20
United States v. Fox, 94 U. S. 315 ---- 13, 27, 30, 36
United States v. Harris, 106 U. S. 629 ---------- 21
United States v. Kagama, 118 U. S. 375 -------- 39
United States v. Noble, 237 U. S. 74, 80 -------- 37
United States v. Ohio Oil Co., 234 U. S. 548 ----- 22
United States v. Perkins, 163 U. S. 652 ---------- 10, 28, 32, 35
VanBrockin v. Anderson, 117 U. S. 151 -------- 41
Vance v. W. A. Vandercook Co., 170 U. S. 438 -- 43
Wallace v. Myers, 38 Fed. 184 ---------- 13
Washington v. Miller, 235 U. S. 422 -------- 20, 35
Western Union Tel. Co. v. Massachusetts, 125 U. S. 530 ---------- 49
Wilcox v. Jackson, 13 Pet. (U. S.) 498 -------- 28
Winchester v. Winchester Water Works, 251 U. S. 192 ---------- 10

# Supreme Court of the United States

OCTOBER TERM, 1925.

---

## No. 202

---

CHARLES C. CHILDERS, State Auditor of the State of Oklahoma, *Appellant*,

*vs.*

JOHN BEAVER AND BENJAMIN QUAPAW, *Appellees.*

---

### BRIEF OF APPELLANT.

---

This is an appeal from a decree of the District Court of the United States for the Eastern District of Oklahoma (300 Fed. 113), enjoining the appellant, the State Auditor of the State of Oklahoma, from proceeding to the collection of the state inheritance tax upon the devolution of the estate of a full-blood Quapaw Indian citizen and resident of the state (R. 9-13). Appeal is taken direct to this Court under Section 238 of the Judicial Code, the cause involving the construction and application of the Constitution of the United States, the constitutionality of statutes of the United States and the claim that the inheritance tax law of the State of Oklahoma, insofar as it applies to Quapaw Indians, is in contravention of the Constitution of the United States.

## ASSIGNMENT OF ERRORS.

I.

The District Court erred in failing to discriminate between an excise upon the transfer of property upon death and a tax upon the property itself.

II.

The District Court erred in effectively holding that, under Constitution, Article I, Section 8, paragraph 3, and Article VI, paragraph 2, and the implications therefrom, the Oklahoma inheritance tax law was not constitutionally applicable to the devolution of the estates of Quapaw Indian citizens of said state.

III.

The District Court erred in construing the Oklahoma Enabling Act (Act Cong. June 16, 1906; 34 Stat. 267, ch. 3335), and the Act of Congress of April 28, 1904, Section 2 (33 Stat. 573), as validly continuing the authority of the Federal government in the direction of the descent and distribution of the estates of deceased citizens of the State of Oklahoma after the erection of said state.

IV.

The District Court erred in construing the Act of Congress of March 2, 1895 (28 Stat. 907), and of March 3, 1921 (41 Stat. 1225), as validly limiting the authority

and sovereignty of the State of Oklahoma in regard to the direction of the devolution of the estates of its citizens who die after the erection of the state.

V.

The District Court erred in construing the Oklahoma Enabling Act and the Act of Congress of April 28, 1904, as not surrendering to the State of Oklahoma full sovereignty over the devolution and probate of the estates of citizen decedents.

VI.

The District Court erred in effectively holding that the State of Oklahoma has no authority over the devolution and probate of the estates of deceased Quapaw Indian citizens of said state, but that such power is properly invested in the Secretary of the Interior under the provisions of Act of Congress of June 25, 1910 (36 Stat. 855).

VII.

The District Court erred in holding all of the foregoing acts of Congress to be constitutional and valid, and not in contravention of the Federal Constitution, Amendment X, insofar as said acts seek to confer upon the Secretary of the Interior, without express constitutional grant, authority over the devolution of the estates of deceased citizens of the State of Oklahoma.

## STATEMENT.

This is an action for an injunction to restrain the collection and enforcement of an inheritance tax against appellees by reason of their inheritance of the estate of one See-Sah Quapaw, a portion of which is a restricted Quapaw Indian allotment located in Ottawa County, Oklahoma.

John Beaver and Benjamin Quapaw are full-blood Quapaw Indians and inherited the estate of See-Sah Quapaw, their wife and sister, respectively, upon the date of her death, to wit: March 4, 1920. The lands which were inherited were patented on or about September 26, 1896, and, by virtue of the Act of March 2, 1895 (28 Stat. 907, ch. 188), same were inalienable for a period of twenty-five years from and after the date of patent.

By virtue of the provisions of the Act of Congress, June 25, 1910 (36 Stat. 855), and supplementary statutes, the Secretary of the Interior determined the heirs of See-Sah Quapaw in accordance with the laws of descent of intestate estates in force in the State of Oklahoma, and the Superintendent of the Quapaw Indian Agency, as administrator, now holds the lands in trust for the benefit of the appellees.

The State of Oklahoma seeks to exact the inherit-

ance or succession tax provided by law to be collected uniformly from all estates whereby devolution takes place under the laws of the state relating to succession *post mortem*. This action was instituted by appellees in an attempt to enjoin the collection of the tax from them, and thereby exempt them from the payment of a like tax to that paid by other persons who receive decedents' estates under the state law.

Section 9891, Compiled Oklahoma Statutes 1921, provides that:

> "A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom:
>
> "First: By will or the intestate laws of this state.
>
> "Second: By deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.
>
> "Third: When the transferee becomes beneficially entitled in possession or expectancy by any such transfer whether made before or after the passage of this act. Said tax shall be upon the clear market value of such property."

Section 9896, id., then prescribes the rate of tax, graduating same upon the degree of consanguinity of the deceased and the person receiving the estate. This apportionment is designed specifically to apply to, and

to operate in harmony with, the laws of descent and distribution of the state.

Section 9898, id., prescribes that:

"Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred, and the administrators, executors and trustees of every estate so transferred, shall be personally liable for such tax until its payment."

Section 9900, id., provides:

"Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will entitle him to pay such taxes in the same manner as he might be entitled by law to do for the payment of the debts of the decedent. Any such administrator, executor or trustee having charge or in trust any legacy for the distribution, subject to such tax, shall deduct the tax therefrom, and shall pay over the same to the state auditor. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value from the person entitled thereto. He shall not deliver, or be compelled to deliver, any specific legacy or property, subject to the tax under this act, to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisees shall deduct such tax therefrom and pay it to the administrator, executor or trustees, and the tax shall remain a lien or charge upon such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy

might be enforced or in the manner hereinafter provided."

Appellees claim that these statutes are in conflict with the laws of the United States; that their estate is leased by the Secretary of the Interior and the income therefrom held in trust for their benefit, and that neither the lands nor the income should be held chargeable for the succession tax aforementioned.

Defendant George F. Short, Attorney General of the State of Oklahoma, was released as a party, by stipulation, and plaintiffs' bill was amended so as to state an alleged cause of action and pray relief solely against C. C. Childers, State Auditor of the State of Oklahoma. The latter answered by raising legal questions only. He admitted all the allegations of ultimate fact, but denied that the appellees were exempt from the uniform operation of the laws of the State of Oklahoma.

It appears from the inheritance tax report, sworn to by O. K. Chandler, Superintendent of the Quapaw Agency and administrator of the estate of See-Sah Quapaw, that the deceased left real estate valued at $215,300.00, and that there was, at the time of See-Sah Quapaw's death, money on hand, belonging to the estate, in the sum of $11,879.44. This estate, being divided ac-

cording to the laws of the State of Oklahoma, would descend in equal parts to the appellees; and, if taxable, the amount due would be computed as follows:

| | | |
|---|---|---|
| Total value of estate | | $226,529.44 |
| To Benjamin Quapaw, husband | | 113,264.72 |
| From 1st $25,000.00 deduct $5000 exempt, taxed at 1 per cent | | 200.00 |
| Second $25,000.00 taxed at 2 per cent | | 500.00 |
| Second $50,000.00 taxed at 3 per cent | | 1,500.00 |
| The $13,264.72 in excess of $100,000.00 taxed at 4 per cent | | 530.58 |
| Total tax against husband amounts to | $ | 2,730.58 |
| To John Beaver, brother | | $113,264.72 |
| From first $25,000.00 deduct $1,000 exempt, taxed at 1 per cent | | 240.00 |
| Second $25,000.00 taxed at 3 per cent | | 750.00 |
| Second $50,000.00 taxed at 4 per cent | | 2,000.00 |
| The $13,264.72 in excess of $100,000.00 taxed at 5 per cent | | 663.23 |
| Total tax against brother amounts to | $ | 3,653.23 |

Inasmuch as there was $11,879.44 cash on hand, of which each Appellee has an interest taxed to the extent of $5,939.72, it may be seen that payment of the inheritance tax can readily be made from such money, leaving a large portion of that, as well as the land, untouched.

The action now before this Court involves only one question for determination, namely: Does the inheri-

tance tax law of the State of Oklahoma extend to the taxation of the devolution of the estate of a Quapaw Indian where a portion of the property comprising such estate was, and is, restricted against alienation?

## BRIEF AND ARGUMENT.

### I.

**The inheritance tax of the State of Oklahoma is a tax upon the transitus of the property, an excise or duty levied upon the privilege of taking property under the state law of succession, and same is not a tax upon the property itself.**

It is admitted, before commencing our argument, that by the provisions of Act of Congress, March 2, 1895 (28 Stat. 876, 907), the lands of See-Sah Quapaw were inalienable at the time of her death, and that they are now held in trust by the Secretary of the Interior for the benefit of her heirs. However, appellant contends that this fact does not operate to prevent the application of the inheritance tax laws, inasmuch as the tax therein provided is upon the transitus and privilege of casting descent under the laws of the State of Oklahoma.

It has been held, in numerous cases, by this Court, that the interpretation placed upon a state statute by

the highest court of the state is conclusive upon the Federal courts.

*Winchester* v. *Winchester Water Works*, 251 U. S. 192, 64 L. ed. 221.
*La Tourette* v. *McMaster*, 248 U. S. 465, 63 L. ed. 362.
*Orr* v. *Allen*, 248 U. S. 35, 63 L. ed. 109.

And in the case of *Carter* v. *Whitson*, 88 Okla. 197, 212 Pac. 752, Kennamer, J., speaking for the Oklahoma Supreme Court, held:

> "The inheritance tax provided for by Chapter 162 of Session Laws 1915, is clearly a tax or duty upon the right or privilege of taking property by will or under the law governing the devolution of the estate. *Booth's Executor* v. *Commonwealth*, 130 Ky. 88, 113 S. W. 61, 33 L. R. A. (N. S.) 592.
>
> "The Supreme Court of the State of Pennsylvania in the case of *Strode* v. *Commonwealth* and *Clymer* v. *Commonwealth*, reported in 52 Pa. 181, and which decisions were afterward sustained by the Supreme Court of the United States (*U. S.* v. *Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. ed. 287), very pertinently says:
>
> "'I repeat, therefore, as the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burden imposed on their property, or on the property of anybody else. It is simply the price of the privilege which the state has conferred upon them. If they do not choose to avail themselves of the privilege, they need not pay the price, and are no worse off than before.'

> "In *Minot* v. *Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, and *State* v. *Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, the courts of each state declared that a reasonable excise tax on the transmission of decedents' property is not in violation of the owner's right of transmission as a necessary incident of property."

In the case of *State* v. *Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, a statute practically identical with that of Oklahoma was attacked upon the ground that it was unconstitutional because it did not comply with the Constitution of that state, which required all taxes assessed upon personal and real property to be apportioned and assessed equally according to the just value thereof. The court, in that case, said:

> "The tax provided for in the statute under consideration is entirely an excise tax. *The whole tenor and scope of the act is one of excise and not a tax upon property.* It is not laid according to any rule or proportion, but is laid upon the interest specified in the act without reference to the whole amount required to be raised for public purposes. It is true that the act contains some language indicating a tax upon property, but it should be construed according to its essential principles, object and effect. Substance, and not form or phrase, is the important thing" (emphasis supplied).

The case of *Booth's Executor* v. *Commonwealth*, cited by Mr. Justice Kennamer in his opinion, is one of the leading American cases on the subject. Stating the nature of the tax, Mr. Chief Justice Settle said:

"The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property by will or descent under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers. * * * The Constitution guarantees to the citizens the right of acquiring, possessing and protecting the property, which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. *There is no provision of our constitution, or that of the United States, which secures the right of any one to contract or dispose of his property after his death, nor the right to any one, whether kindred or not, to take by inheritance.* Descent is a creature of statute, and not a natural right. 2 Bl. Com., pp. 10-13: *Strode* v. *Com.*, 52 Pa. 181. * * *

"It is, however, insisted by appellant that, as the tax is a certain per centum of the value of the estate, and the property pays it, it is therefore a tax on the property itself. This argument is answered by the opinion in *Eyre* v. *Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, as follows: 'But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred, and to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and, as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted.' * * *" (Emphasis supplied).

Turning then to the contention so closely related to the case at bar, the learned justice continued:

Jones v Jones 234/615—

> "*It is further contended by appellant that the effect of the act is to tax property otherwise exempt from taxation;* and, as an instance in point, it is said that, a religious institution of learning receiving a devise is sought to be taxed thereon, although its property is by law exempt from taxation. *The answer to this complaint must be a restatement of the proposition that the tax is not imposed upon the property, but on the right of succession.* Bonds of the United States are by act of Congress exempt from taxation; but in the cases of *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. 829, and *Wallace* v. *Myers* (C. C.), 4 L. R. A. 171, 38 Fed. 184, a state inheritance tax upon legacies of such bonds was sustained upon the principle above stated" (emphasis supplied).

As suggested by the Kentucky court, the Federal Supreme Court has accepted the prevailing reasoning pronounced in the Booth case. Mr. Justice McKenna, in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. ed. 1037, after reviewing the history of succession taxes from the Roman law to the date of that decision, and after citing, with approval, numerous authorities, said:

> "It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that

the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

See, also, *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192.

II.

**Members of the Quapaw Tribe of Indians, residing within the State of Oklahoma, are citizens of the said state, and, as such, their rights to transfer and receive property after death has its inception in, and is regulated by the laws of the State of Oklahoma governing decedents' estates.**

The nature of the inheritance tax having been established as a duty imposed by the jurisdiction governing the descent and transmission of decedents' estates, our next contention is that See-Sah Quapaw exercises her right to transmit property at death, and appellees acquire their right to receive property by devolution, solely by grace of the laws of the State of Oklahoma.

Allotment of Quapaw lands were made under Act Cong. March 2nd, 1895 (28 Stat. 907, ch. 188), but no provision was made in that act for the mode of descent of decedent estates. Mr. Bledsoe, in his work, "Indian Land Laws" (2nd ed.), Section 263, states that it was uniformly recognized, by the attorneys of the district,

that the law of the forum, to wit, the Arkansas statute of descent in force in Indian Territory, subsequent to May 2nd, 1890, was controlling.

By the Act Cong. April 28, 1904 (33 Stat. 573, ch. 1824), the laws of descent of the State of Arkansas were specifically "extended in their operation, so as to embrace all persons and estates" in Indian Territory, "whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

Appellees alleged in their bill that they are citizens of Ottawa County, State of Oklahoma, and hence discussion of this proposition may be briefly dispensed with. Reference need only be made to Section 2 of the Enabling Act (Act Cong. June 16, 1906; 34 Stat. 267, ch. 3335), to Section 3 of the same act, and to the fact that the terms of the act were accepted. These factors operated to confer state citizenship upon the Quapaws.

*Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627.
*Boyd* v. *Nebraska*, 143 U. S. 175, 36 L. ed. 103.
*Bolln* v. *Nebraska*, 176 U. S. 83, 44 L. ed. 382.
*Heckman* v. *United States*, 224 U. S. 413, 56 L. ed. 820.

By the act of April 28th, 1904, *supra*, and by virtue of the plenary authority of Congress over unadmitted territories, the law of descent of the State of Arkansas was placed in force in the Quapaw district, and full probate jurisdiction was conferred upon the Federal territorial courts. However, by the Enabling Act, the Arkansas law was superseded and the courts of Oklahoma succeeded to the jurisdiction over Indian estates. That the admission of Oklahoma substituted the Oklahoma law for that of Arkansas has not been seriously questioned since the decision in the case of *Jefferson* v. *Fink*, 247 U. S. 288, 62 L. ed. 1117.

Mr. Justice Van Devanter, in that decision, stated:

> "In determining who inherited the land the courts below applied the Oklahoma law of descent existing at the time of the allottee's death (53 Okla. 272, 155 Pac. 852); and the question for decision here is whether, under legislation of Congress, an Arkansas law, theretofore put in force in the Indian Territory, should have been applied. * * *
>
> "A territorial government never was established in the Indian Territory and it never had a territorial legislature. Apart from the tribal laws relating to descent and distribution, the only laws which became operative there were such as Congress enacted or put in force. * * *
>
> "The allotment in question was made and the tribal deeds issued shortly after the Act of 1902 (Supplemental Creek Agreement), became effective. And this was followed by the Act of April 28, 1904,

chap. 1824, 33 Stat. at L. 573, Sec. 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken 'to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise.'

"Referring to the purpose with which the Arkansas statutes were put in force in that territory and their status there, this court said in *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 56 L. ed. 1205, 1211, 32 Sup. Ct. Rep. 704:

" 'Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local legislature, Congress alone could act. *Plainly, its action was intended to be merely provisional.*'

"By the Enabling Act of June 16, 1906, chap. 3335, 34 Stat. at L. 267, provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial legislature. Deeming it better that the new State should come into the Union with a body of laws applying with practical uniformity throughout the State, Congress provided in the Enabling Act (Sec. 13) that 'the laws in force in the *territory of Oklahoma*, as far as applicable, shall *extend over and apply to said State* until changed by the legislature thereof;' and also (Sec. 21) that 'all laws in force in the *territory of Oklahoma* at the time of the admission of said State

into the Union shall be in force *throughout the State*, except as modified or changed by this Act or by the Constitution of the State.' The people of the State, taking the same view, provided in their Constitution (Art. 25, Sec. 2) that 'all laws in force in the *territory of Oklahoma* at the time of the admission of the State into the Union, which are not repugnant to this Constitution and which are not locally inapplicable, shall be *extended to and remain in force in the State of Oklahoma* until they expire by their own limitation or are altered or repealed by law.'

"The State was admitted into the Union November 16th, 1907, and thereupon the laws of the territory of Oklahoma, relating to descent and distribution (Okla. Rev. Stat. 1903, Chap. 86, Art. 4) became the laws of the State" (emphasis supplied).

The learned justice continued:

"Thereafter Congress, by the Act of May 27th, 1908, Chap. 199, 35 Stat. at L. 312, Sec. 9, *recognized and treated* 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes" (emphasis supplied).

It should be noted that the phrase "recognized and treated" was used rather than the phrase "established and put in force." Such was the full import of the decision, for, after a short further discussion, the decision states:

"We have seen that Congress was accustomed to subjecting allotted Indian lands to the local

laws of descent, and also that its action in putting the Arkansas law in force in the Indian Territory was intended to be merely provisional. With this in mind it seems very plain that the provisions before quoted from the Enabling Act were intended to result, at the time of admission of the new State, in the substitution of the Oklahoma law of descent for that of Arkansas, theretofore put in force in the Indian Territory. The recognition given to the Oklahoma law by Congress in the Act of 1908 hardly can be explained on any other theory."

The Court intimated in the closing paragraph of the opinion that the two provisos to Section 6 of the Creek Supplemental Agreement (Act Cong. June 30, 1902, ch. 1323, 32 Stat. at L. 500) would still control as a limitation upon the Oklahoma law of descent; but Mr. Justice Kennamer, of the Oklahoma Supreme Court, in the case of *In re Pigeon's Estate*, 81 Okla. 180, 198 Pac. 309, later affirmed by this Court, conclusively destroyed this conception of any Federal control over devolution of the estates of citizens of this State. This decision approved all that portion of *Jefferson* v. *Fink*, above quoted, and held that the laws of descent and distribution of the State of Oklahoma governed absolutely in the devolution of the estates of deceased allottees. Quoting:

"And as a rule of statutory construction, uniformly adhered to by the courts, is that every statute is to be construed with reference to its intended Scope and the purpose of the Legislature in enact-

ing it, and there is no reason to doubt that the Congress in extending the laws of the territory of Oklahoma in force in the State intended for the same to apply to that class of citizens that Congress was vested with power to legislate for within the State, in order that the citizens of the new State would be provided with a system, as nearly as possible, of uniform laws, * * * .

"For a number of years Congress had evidenced an intention of preparing the members of the different tribes for full citizenship and the benefits of a new order of things. So we conclude that Congress intended by extending the laws of the territory of Oklahoma in force throughout the State that said laws were to be applicable to Indians and their estates, and *that since the admission of Oklahoma as a State into the Union that the devolution of the estates of deceased allottees of the different tribes of Indians are governed by the laws of the State of Oklahoma*" (emphasis supplied).

Both of these strong decisions establish the ascendency of the Oklahoma law of descent and the fact that devolution takes place by virtue of that law.

See, also:

*Teague* v. *Smith*, 85 Okla. 12, 204 Pac. 439.
*Harrison* v. *Harrison*, 87 Okla. 91, 209 Pac. 737.
*Graves* v. *Jacobs*, 92 Okla. 62, 217 Pac. 871.

This brings us, then, to the broader contention—the next in line of progress, beginning with *Washington* v. *Miller*, 235 U. S. 422, 59 L. ed. 295, proceeding in regular development through the rule of *Jefferson* v.

*Fink*, *supra*, and then the Pigeon case, *supra*. These cases form the foundation for the next step in progressive reasoning, namely, that *the Federal Government is without authority to control the devolution of estates in Oklahoma.*

*Nowhere, in the Federal Constitution, is there any wording which could be construed to authorize the passage of a law governing the devolution of estates of decedents in an admitted State.* Though the power of Congress, over territories, is plenary, it is elementary that all acts designed for territorial purposes became inoperative, *ipso facto*, as Federal legislation, upon the admission of Oklahoma into the Union, regardless of the provisions of the Enabling Act.

In the early case of *United States* v. *Harris*, 106 U. S. 629, 27 L. ed. 290, this Court clearly stated that the government of the United States, different from that of the sovereign states, is a government of delegated, limited and enumerated powers and that Congress might not lawfully act except by virtue of some express or implied constitutional warrant. To the same effect was *McCulloch* v. *Maryland*, 4 Wheat. 316, 428, and *Grafton* v. *United States*, 206 U. S. 333, 51 L. ed. 1084.

In the latter case it was said:

"The government of the United States and the

governments of the several states, in the exercise of their respective powers, move on different lines. The government of the United States has no power except such as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government and which have not been surrendered by them to the general government."

These doctrines found further support in the Pipe Line case (*U. S.* v. *Ohio Oil Co.*, 234 U. S. 548, 58 L. ed. 1459), and the Child Labor case (*Hammer* v. *Dagenhart*, 247 U. S. 241, 62 L. ed. 1101), and the earlier Slaughterhouse cases (16 Wall. 36, 21 L. ed. 294).

It might be contended that Section 1 of the Oklahoma Enabling Act, specifying that the Government should have plenary authority over the Indians, operates to confer upon the Federal Government the power to exempt from State charges the property of Indians in this State. This contention, however, may be completely exploded by reference to the case of *Coyle* v. *Oklahoma*, 221 U. S. 559, 55 L. ed. 852, where, in the course of the opinion, it was said:

"The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that 'new states may be admitted by the Congress into this Union.' The only expressed re-

striction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, without the consent of such states, as well as of the Congress. But what is this power? It is not to admit political organizations which are less or greater or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, 'a power to admit states.' The definition of 'a state' is found in the powers possessed by the original states which adopt the Constitution—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted as 'a new and entire member of the United States of America.' 1 Stat. at L. 191, 189, chaps. 7, 4. Emphatic and significant as is the phrase admitted as 'an entire member', even stronger was the declaration upon the admission in 1796 of Tennessee (1 Stat. at L. 481, chap. 47) as the third new state, it being declared to be 'one of the United States of America, on an equal footing with the original states in all respects whatsoever,' phraseology which has ever since been substantially followed in admissions acts, *concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original states.'*

"The power is to admit 'new states into this Union.' 'This Union' was, and is, a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not

delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the condition imposed upon new states by its own legislation admitting them into the union; and, second, that such new state might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. * * * In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and, third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. * * *

"The reference of Justice Catron to the terms and conditions in act of 1812 is to a provision in the act of 1811 (2 Stat. at L. pp. 641, 642, chap. 21), quite common in enabling acts, by which the new state disclaimed title to the public lands and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable water should forever remain open and free, etc. Such stipulations, as we shall see, being within the

sphere of congressional power, can derive no force from the consent of the state. *Like stipulations, as well as others in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state.* * * * So far as the state has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, by reason of the terms in which the acts, admitting them to the Union, have been framed. * * * *The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission*" (emphasis supplied).

In the case of *McNulty* v. *Beatty*, 10 How. 71, 13 L. ed. 335, at page 78 of the official report, it was stated:

"By the admission of the State of Wisconsin into the Union, on the 29th day of May, 1848, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of

> their judgments in this court by appeals or writs or error. This appellate power does not depend upon the Judiciary Act of 1789, but upon laws regulating the judicial proceedings of the territory. And these necessarily ceased with the termination of the territorial government."

And again in *Hawkins* v. *Bleakley*, 243 U. S. 210, 61 L. ed. 678, at page 684, this court said:

> "The regulation, although embracing provisions of the ordinance declared to be unalterable, unless by common consent, had no further force in Iowa, after its admission as a state, and the adoption of a state constitution, than other acts of Congress for the government of the territory. All were superseded by the state constitution (citing authorities). The State of Iowa, therefore, is as much at liberty as any other state to abolish or limit the right of trial by jury; or to provide for a waiver of that right as it has done by the act under consideration."

See, also, *Kansas* v. *Colorado*, 206 U. S. 95, 51 L. ed. 956.

In other words, though Congress may, and does, have some authority over the Indians, such power may not be extended by act of Congress in the form of an enabling act nor may the delegated power of Congress, under the Constitution, be increased by consent of a state. *The Federal government operating under delegated authority cannot enlarge its sovereignty or, in*

*effect, amend the Federal Constitution by compact with or consent of any one state.*

In the case of *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192, it was said that "the title and modes of disposition of real property, within a state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority," and also:

> "The power of the state to regulate the tenure of real property within her limits and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."

We contend that the admission of Oklahoma as a state terminated all Federal laws of descent and distribution theretofore in force in Indian Territory, irrespective of the provisions of the Enabling Act; that the states are sovereign in all those particulars wherein it has not joined in the *general* delegation to the Federal government; and that inasmuch as no authority has been delegated to the latter respecting laws of descent and distribution, that power resides in the State of Oklahoma, as a sovereign state.

*Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 665.
*Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.
*New York* v. *Miln*, 11 Pet. 102, 9 L. ed. 648.
*Kidd* v. *Pearson*, 128 U. S. 1.
*Mager* v. *Grimes*, 49 U. S. 490, 12 L. ed. 1168.

And, supporting the contention heretofore advanced, that the state has the sole and exclusive power over the disposition of property under its jurisdiction, are the following cases:

*McCormick* v. *Sullivant*, 10 Wheat. 192, 6 L. ed. 300.
*Segley* v. *Car Co.*, 120 U. S. 580, 30 L. ed. 789.
*United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287.
*Snyder* v. *Bettman*, 190 U. S. 249, 47 L. ed. 1035.
*Wilcox* v. *Jackson*, 13 Pet. 498, 10 L. ed. 264.
*Langdon* v. *Sherwood*, 124 U. S. 74, 31 L. ed. 344.
*O'Callighan* v. *O'Brien*, 199 U. S. 99, 50 L. ed. 101.
*Ellis* v. *Davis*, 109 U. S. 485, 27 L. ed. 1006.
*Knowlton* v. *Moore*, 178 U. S. 43, 44 L. ed. 970.
*Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998.

We are aware that both this Court and the state supreme court have deviated from this obvious division of powers doctrine in several cases, but our contention is so fundamental in its nature, dealing with the very basis of our governmental institution, that had this contention been raised in the various cases the courts would have necessarily been obliged to qualify their decisions in order to conform to the well accepted division of powers between the states and the Federal government.

That such a view is not without merit is evidenced by quite a recent case decided by this Court, it being the case of *Sunderland* v. *United States*, 266 U. S. 226, 69 L. ed. 70.

That cause arose over a sale of certain property to Sunderland by one Nathaniel Perryman, a Creek half-blood, whose homestead was allotted to him with restrictions against alienation until April 26, 1931, subject, however, to removal, wholly or in part, by the Secretary of the Interior, "under such rules and regulations concerning the terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe" (Act of Congress of May 27, 1908, 35 Stat. 312, ch. 199, Sec. 1). Upon application, the secretary removed the restrictions from a portion of the homestead, which was then sold, the proceeds of the sale being retained by the secretary. Subsequently a portion of the proceeds was used to purchase another tract of land (the subject of controversy), such purchase being authorized by the secretary, upon condition that the deed of conveyance contain a clause restricting the alienation of the land so purchased until April 26, 1931, "unless made with the consent of, and approved by, the secretary of the Interior." The deed was made accordingly and duly recorded. Perryman, thereafter, without the consent of the secretary, sold and conveyed the land to Sunderland.

The United States sought to cancel the conveyance which Sunderland vigorously resisted. In the opinion the court said:

> "The power of Congress is challenged upon the ground that the land had become subject to the jurisdiction of the state and was exclusively within the control of its laws. *The general rule is not to be doubted that the tenure, transfer, control and disposition of real property are matters which rest exclusively within the state where the property lies* (*United States* v. *Fox*, 94 U. S. 315, 321, 322, 24 L. ed. 192, 193); but it by no means follows that a restriction upon alienation, limited as it is here, may not be imposed by the United States as a condition upon which a purchase of private lands within the state will be made for an Indian ward. *The question is argued as though there had been an actual invasion, or an interference with, the authority of the state to regulate and condition the transfer of land within its boundaries. But there is no such invasion or interference.* If Congress, in fulfillment of its duty to protect the Indians, whose welfare is the peculiar concern of the Federal government, deems it proper to restrict for a limited time the right of the individual Indian to alienate land purchased for him with the funds arising from the sale of other lands originally subject to a like restriction, *we are not aware of anything which stands in the way.* THE STATE OF OKLAHOMA IS NOT CONCERNED SINCE THERE IS NO STATE STATUTE, RULE OF LAW OR POLICY, WHICH HAS BEEN CALLED TO OUR ATTENTION, TO THE CONTRARY EFFECT. IF THERE WERE, OR IF THE POWER OF STATE TAXATION WERE INVOLVED, WE SHOULD CONSIDER THE QUESTION OF SUPREMACY

OF POWER, BUT NO SUCH QUESTION IS PRESENTED BY THIS RECORD" (emphasis supplied).

This Court has recognized the proposition that the State of Oklahoma has control of the transfer of property, and in the instant case, unlike the Sunderland case, the State of Oklahoma is advancing its state statutes, the rules of policy upon which its sovereignty is founded, has put into the balance its power of state taxation and is most vehemently asserting that the "peculiar concern of the Federal government" is not so powerful as it is peculiar: *that the Federal government has no control whatever over the devolution of property in Oklahoma and cannot, by the claim of such control, defeat the sovereign power of the state to tax privileges which it alone confers.*

It has been contended that the state disclaimed, by the Enabling Act, the right to control the devolution of Quapaw Indians' estates. But in view of the authorities hereinbefore set forth it is clear that such power over its citizens is an inherent attribute of the state, one of the composites of its very existence.

Inasmuch as probate matters within a sovereign state are matters entirely beyond the delegations to the Federal Union, we submit that since statehood the descent of property of citizens of the State of Oklahoma

are subject to the laws of the state alone. Amendment X to the Federal Constitution solemnly guarantees to the sovereign states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Whatever authority the Federal government may have had over the Quapaw Indians, before statehood, or whatever control it may have over them while living, after statehood, as to the alienability of their lands, the fact remains that matters of descent of their property, involving the necessity of probate determinations, are matters solely for the state in which such Indians are domiciled as citizens; and, inasmuch as transmission and inheritance of decedents' estates, within the State of Oklahoma, are by virtue of its laws, we submit that the State of Oklahoma may collect an excise on such right, even though the decedent and the heirs be of Indian blood.

*Carter* v. *Whitson, supra.*
*Booth's Executor* v. *Commonwealth, supra.*
*Magoun* v. *Illinois Trust & S. Bank, supra.*
*United States* v. *Perkins, supra.*

III.

**That the property, transmitted by decedent under the laws of descent, is exempt from taxation does not prevent the operation of the succession tax law upon the devolution of the estate.**

The authorities heretofore set forth demonstrate that the devolution of an Indian's estate is subject to the succession taxes of the state, in the absence of other considerations. It therefore remains only to eliminate those considerations which are urged to defeat the general principles heretofore established.

Appellees contend that by reason of the fact that the Federal acts of 1895 restricted the estate of See-Sah Quapaw for a period of twenty-five years from and after the date of the patent, and that said restrictions were extended for an additional period of twenty-five years from March 3, 1921, by the Federal act of that date (41 Stat. 1225, 1248), such restrictions make the land non-taxable and non-chargeable with a tax lien, such as provided in Section 9898, Compiled Oklahoma Statutes 1921. Appellees further contend, upon the basis of the above premises, that they are not subject to the inheritance tax law.

A very analogous situation was presented to this Court in the case of *Plummer* v. *Coler*, *supra*. It appeared that Joseph Plummer, a citizen and resident of

the State of New York, died, devising to Harry Plummer, his executor, $40,000.00 in United States bonds. The Act of Congress, under which the bonds were issued, provided:

> "all of which several classes of bonds and the interest thereon shall be exempt from the payment of all taxes and duties of the United States, *as well as from taxation in any form by or under state, municipal or local authority*" (emphasis supplied).

The State of New York sought to collect an inheritance tax upon this legacy. Plummer asserted an exemption by reason of the Federal statute, contending that "the states have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the state."

This contention of public governmental policy, supported by *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 537, is, we submit, fully as strong as any argument of governmental policy toward the Indian tribes; but, in the opinion, the court held that:

> "We think the conclusion, fairly to be drawn from the state and Federal cases is, that the right to take property by will or descent is derived from,

and regulated by, municipal (state) law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities does not invalidate the tax or the law under which it is imposed."

See, also:

*Wallace* v. *Myers*, 38 Fed. 184.
*Estate of Sherman*, 153 N. Y. 1, 46 N. E. 1032.
*Strode* v. *Commonwealth*, 52 Pac. 181.

Possibly the strongest case from this Court, yet the most frequently cited and approved, is that of *United States* v. *Perkins* (163 U. S. 625, 41 L. ed. 287), cited in *Carter* v. *Whitson, supra*, wherein the question involved was the subjection to inheritance tax of property bequeathed to the United States itself. It was, of course, conceded that the property of the United States may not be taxed; nor could the state affix a lien upon property belonging to the Federal government. Yet, Mr. Justice Brown, in the opinion of the court, quoting from *Mager* v. *Grimes*, 8 How. 490, 493, said:

"The law in question is nothing more than an exercise of the power which every state and sovereignty possess, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who

shall and who shall not be capable of taking it. * * * If a state may deny the privilege altogether, it follows that when it grants it, *it may annex to the grant any conditions which it supposes to be required by its interest or policy. To the same effect is United States* v. *Fox*, 94 U. S. 315.

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. *The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it*" (emphasis supplied).

Hence, it may be seen that this Court recognizes that a state inheritance tax may be fixed as a prior charge, or lien, even upon property inherited by the United States. In view of such holding, appellees' contentions of exemption appear to have small foundation in authority.

However, the tax need not be collected from the real property at all. The tax is specifically made a personal debt of the recipient of the inheritance, and Section 9900, Compiled Oklahoma Statutes 1921, provides several methods by which collection may be enforced. Inasmuch as there is sufficient cash in the hands of the administrator of the decedent's estate to pay the tax, the second

method provided by Section 9900, *supra*, would be entirely proper. This portion of the statute provides:

> "Any administrator, executor or trustee *having in charge or in trust* any legacy or property for distribution, subject to such tax, shall deduct the tax therefrom, and shall pay over the same to the State Auditor" (emphasis supplied).

Though the case of *Kendall* v. *Ewert*, 259 U. S. 139, 66 L. ed. 862, is not applicable in point of fact, that case clearly expresses the views of this Court upon the matter at bar. In that case Ewert, an employee of the Quapaw Agency, purchased some land from a full-blood Quapaw named Redeagle. In a suit to recover the property for the heirs of Redeagle, upon the grounds that the transaction was void for fraud and as against public policy, it developed that Ewert had received considerable money from royalties for lead and zinc ores mined from the land.

Mr. Justice Clark rendered the opinion of the court (from which there were no dissents), said:

> "The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these funds accrued were clearly personal property (*United States* v. *Noble*, 237 U. S. 74, 80, 35 Sup. Ct. 532, 59 L. ed. 854), which, on the death of Redeagle, would pass to his administrator *for the purposes of paying ANY INHERITANCE or other taxes*, which might

be properly chargeable against it, and for other administration charges and for distribution. *There being no congressional legislation providing for the administration of such intestate property, the state law is applicable, and we think the administrator is a competent party to assert the right of the estate, whatever it may be, to rents or royalties derived from the land during Redeagle's lifetime*" (emphasis supplied).

IV.

**Quapaw Indian estates are not such a type of Federal instrumentality as to exempt their devolution from the succession taxes of the state under whose laws the transfer takes place.**

Another consideration is that argument which asserts that because the lands of the Quapaws are inalienable they are essentially in the hands of a Federal instrumentality, and that by reason of their control by the Secretary of the Interior they are exempt from every sort of tax. It may also be eliminated.

We have pointed out that the devolution of decedents' estates is not by a Federal statute, and that the Secretary of the Interior does not possess, along with the money and property he *assumes* to hold the authority under which the appellees inherit See-Sah Quapaw's property. Hence, it is not within his power, as an instrument of the Federal government, to exempt this right of inheritance (which appellees possess, regardless of him) from taxation.

There can be no question to the proposition that the power of taxation in the state does not extend to those matters which constitute Federal instrumentalities as the right of taxation in the Federal government does not extend to those matters which are instrumentalities for carrying out the governmental purposes for the state. This principle has not been questioned since the famous decision of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316; but the question arises as to whether Congress can empower the Interior Department to assume any control over Indian estates to such extent as to clothe their devolution with the character of a Federal instrumentality in such manner as to withdraw it from that class of rights upon which the state's system of taxation operates.

As has been already stated, there can be no doubt that prior to statehood the authority of Congress in the Indian country was plenary. It was said in the case of *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228:

> "The power of the general government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in the government because it never existed anyhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied, and because it alone can enforce its laws on all tribes."

This is the case which is most consistently cited to sustain the claim of government control over the Indians, and it was entirely true as long as the relationship between the government and the Indians existed solely in unadmitted territories. The self-same argument justifies Federal authority over territories. But it is without any logical force when used to sustain a Federal supervision over citizens of a sovereign state. The Federal power is not necessary for the protection of the Quapaws any more than it is for naturalized Teutons or Scandinavians or Latins; the state furnishes them ample protection and has sufficient power to increase the paternal direction as it becomes necessary. That the Federal authority existed nowhere else prior to statehood, and that the theatre of its exercise is within the geographical limits of the United States are no more persuasive when applied to Indian regulation than to the regulation of any other citizen of the state. And, lastly, the state is denying the power most emphatically, asserting that it has ample ability to enforce laws generally throughout its domain, and is protesting vehemently against the encroachment upon its sovereignty by the Federal government.

The lands were allotted to the Indians while Congress had plenary authority over the territory, and Congress contracted an exemption from taxation on the

land which could not be impaired by the Enabling Act (*Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941). Such restriction, no doubt, confers upon the Federal government an interest in the land *during the lifetime of the allottee*, but not thereafter, because, in the absence of a delegation to Congress to pass laws of descent and distribution, the Federal government has no more right to entail lands in a sovereign state than any individual. For, as was said in the case of *Van Brockin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845:

> "The United States do not, and cannot, hold property as a monarch may for private or personal purposes. All of the property and revenues of the United States must be held for and applied as all taxes, duties, imports and assizes must be laid and collected, to pay the debts and provide for the common defense and general welfare of the United States."

We believe that we have already demonstrated that there is no governmental purpose in the authority assumed by the United States over the Indians after statehood, so we inquire by what method it is to be determined that an instrumentality may be created for a purely private or philanthropic purpose? If the United States lacks governmental supervision, and, as said in *Van Brockin* v. *Anderson, supra*, it cannot hold the title for any other purpose, by what means is an instrumentality justified?

The theory of exemption by reason of a governmental instrumentality or agency is that such agency is performing a proper governmental function of the sovereignty. But, just as the right to tax must be measured by the extent to which it could be carried (as was said in *McCulloch* v. *Maryland, supra*), so, it seems to us, the right of one sovereignty in our dual system to exempt persons or rights or property from taxtion by the other should be measured by the same rule.

The necessary conflict between the right of the states to collect revenue for state purposes and the right of the Federal government to exempt for its purposes requires that the right to exemption be recognized only in those cases where the subject matter thereof is a proper, vital and necessary governmental function, such as the holding of lands for postoffices, forts, arsenals and the like. But the power residing in the Federal government to assume control over, and withdraw from, taxation the rights or property of citizens of a state, when exercised or located within the state, must necessarily be limited.

The inverse of the instant cause arose in the case of *South Carolina* v. *United States*, 199 U. S. 437, 50 L. ed. 261. In that case the question arose as to the liability of the dispensary agent of the State of South Carolina for license taxes prescribed by the Federal

revenue laws on dealers of intoxicating liquors. The State of South Carolina, in the exercise of its sovereign power, had taken charge of the business of selling liquor in that state, and the Treasury Department of the Federal Government was attempting to collect the liquor license tax from the state's dispensary agents. In discussing the question, Mr. Justice Brewer said:

> "Among those matters which are implied, though not expressed, is that the nation may not, in the exercise of its powers, prevent a state from discharging the ordinary functions of government, just as it follows from the second clause of Article 6 of the Constitution, that no state can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.
>
> * * * * * * * * *
>
> "The right of South Carolina to control the sale of liquor by the dispensary system has been sustained, *Vance* v. *W. A. Vandercrook Co.*, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow and the whole body of internal revenue tax be thus stricken down.
>
> "We may go a step further. There are some insisting that the state shall become the owner of all property, and the manager of all business. Of

course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. * * * Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument would exempt the sale by a state of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent it would be almost impossible for the National Government to collect any revenues. In other words, in this indirect way it would be within the competency of the state to practically destroy the efficiency of the National Government."

Further on in the opinion it is said:

"There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the state from Federal taxation in respect to its property and the discharge of all its functions. Where and how shall the line be-

tween them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government, with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent the implication will go, we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of that Constitution intend should be exempt? Certain it is that modern notions as to the extent to which the functions of a state may be carried had then no hold.

"Looking, therefore, at the Constitution in the light of the conditions at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the National Government meant that power should be complete, and never thought that the states, by extending their functions, could practically destroy it."

So if the states must submit to exactions upon their enterprises, it would seem that the reverse should also be true. Uniformity of holding and mutuality of relationship demands that the states be accorded the same benefits as are accorded the general government. The conflict which necessarily exists between the right of the Federal Government to tax and the right of the State to exempt, likewise exists between the right of the State to tax and the right of the Federal Government to exempt; that in the same manner as it was never contem-

plated by the framers of the Constitution of the United States that the State, by extending its functions to the entry into other than purely governmental enterprises, could defeat the general government in the collection of its revenues, so it was never contemplated by those framers of the Constitution that Congress would attempt to assume a guardianship over people of a sovereign state or any interest in them which would militate against the state's sovereign right to define the rights of transmission and inheritance of property or to levy an excise upon such rights.

In the debates of the First Congress (Annals of Congress, Vol. 1, p. 455), discussing the proposed amendments of the Federal Constitution, Mr. Madison said:

> "It is true, the powers of the general government are circumscribed, they are directed to particular objects; but even if the government keeps within those limits, it has certain discretionary powers with respect to the means, *which may admit of abuse to a certain extent,* in the same manner as the powers of the State governments under their constitutions may to an indefinite extent; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof; this enables them to fulfill every purpose for which the Government was established.

Now, may not laws be considered necessary and proper for Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislature, for fulfilling the more extended objects of those governments. I will state an instance which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature; may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their contitutions the State Governments had in view? *If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government*" (emphasis ours).

It, indeed, seems that Mr. Madison's fears were well founded when one views the situation with regard to Oklahoma's Indian citizenry. And his views, together with that expressed by others bringing about the insertion of Amendment X into our Federal Constitution, are most instructive in construing the limitations which it imposes.

Speaking of "State Control of Local Taxation", Hamilton said:

"And making this concession, I affirm that (with the sole exception of duties on imports and ex-

ports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that *an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.* * * * Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a State; would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its constitution plainly supposes to exist in the State government? * * * But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. *These will be merely acts of usurpation and will deserve to be treated as such.* * * * Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled; *yet a law for abrogating or preventing the collection of a tax laid by the authority of the State (unless upon imports and exports) would not be the supreme law of the land but a usurpation of power not granted by the Constitution"* (emphasis supplied).

The Federalist, essay No. 31.

When the Income Tax case was before this Court for rehearing, Chief Justice Fuller, delivering the opinion for the Court, said:

"In our judgment, the construction given to the Constitution by the authors of the Federalist (the

five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded."

*Pollack* v. *Farmers' Loan Co., supra.*

"The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitled it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the view with which it was framed."

Chief Justice Marshall in *Cohens* v. *State of Virginia*, 6 Wheat. 264—Marshall's Constitutional Opinions (Dillon), 407, 408.

In the South Carolina case it was indicated that the principle governing such as the one at bar should be that the exemption of agencies of the one sovereign from the taxation of the other is limited to those instrumentalities which are strictly governmental in character, and that the exemption does not extend to those things which are not induced by an urgent governmental necessity. This same principle was the basis of the decision in the *Western Union Telegraph Company* v. *Attorney General of Massachusetts*, 125 U. S. 530, 31 L. ed. 794. From that case we quote:

*"It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is*

*for that reason alone inhibited by the Constitution.* To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The states are, and they must ever be, co-existant with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. *Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.* * * * A very large proportion of the property within the states is employed in execution of the powers of government. It belongs to government agents and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundaries, shipyards and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenues of the states, it is manifest the state governments would be paralyzed. While it is of the utmost importance that all powers vested by the Constitution of the United States in the general government should be preserved in full efficiency and while recent events have called for the unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited" (emphasis supplied).

Though the exemption of the land from taxation and the restrictions upon alienation are contractual obligations affixing themselves to the land during the lifetime of the allottee, the assumed guardianship over the funds, properties and the disposition thereof upon death can only find justification in governmental jurisdiction, a power never conferred upon the Federal government by the Constitution. Therefore, it seems sophistical to urge that such "peculiar interest" of the United States is a governmental instrumentality of sufficient necessity to justify an exemption.

It may be the policy of the Federal government to *assist the Indians in the accumulation of great wealth and perpetuating it in their respective families*, but it seems inconceivable that such a policy could possibly be construed as an authorized governmental function, defeating the general operation of the laws of the state in which such persons are domiciled as citizens.

Exemption of Federal agencies from state taxation is dependent, not upon the nature of the agent, or upon the fact that they are agents, but upon the effect of the tax—that is, whether the tax really deprives the agent of the power to serve the government or hinders the exercise of the governmental power. Either where no power exists or where no hindrance is imposed, no exemption is created.

Hence, we maintain that the management of the funds and properties for the benefit of the private gain of the Indian or his heirs should be treated in that class of activities similar to the private enterprises in which a state engages, or even in a less favorable light, since it is wholly unauthorized and destructive to the American political organization. Investments made for the purpose of increasing the value of the individual estate of Indians and privileges enjoyed, at the hands of the state, permitting perpetuation of that estate in the manner provided by the state statutes surely should be considered taxable by the Commonwealth.

## CONCLUSION.

In view, therefore, of the propositions established above, it should be apparent that the devolution of the estate of See-Sah Quapaw was taxable under the laws of the state by whose grace such devolution took place: that the injunction decree of the district court was erroneously entered, and that the cause should be reversed.

Respectfully submitted,

GEORGE F. SHORT,
Attorney General of Oklahoma,

J. BERRY KING and
LEON S. HIRSH,
Assistant Attorneys General of Oklahoma,
*For the Appellant.*

C. H. NICHOLAS, Inheritance Tax Attorney,
State Auditor's Office, of Counsel.

February 10, 1926.